

Chapter XII

JUDICIAL REVIEW OF DMQ DECISIONS

A. General Description of Functions

A physician whose license has been disciplined may seek judicial review of MBC's decision by filing a petition for writ of mandate (also called a "writ of administrative mandamus") in superior court under Code of Civil Procedure (CCP) section 1094.5.²⁸⁸ The physician may also seek a court order staying MBC's decision pending the conclusion of the superior court's review. Under MBC's unique venue statute, a writ challenging DMQ's disciplinary decision may be filed in any city in which the Board has an office.²⁸⁹

In conducting its review of the agency's decision, the superior court sits alone, without a jury, and reviews the record of the administrative hearing (including the transcripts of the testimony that was presented at the hearing and the exhibits that were introduced). The court does not call witnesses, nor does it consider new evidence that was not introduced at the administrative hearing (except under very narrow statutory circumstances). Generally, the focus of the court's review is to determine whether the agency's findings are supported by the weight of the evidence introduced during the administrative hearing, whether the decision is supported by the findings, and/or whether the penalty imposed is within the agency's discretion or constitutes an abuse of that discretion.²⁹⁰ The court exercises its independent judgment and reviews the administrative record as a whole in determining these issues. There is a presumption the agency's decision is correct,²⁹¹ and the petitioner (the disciplined licensee or applicant denied a license) has the burden of demonstrating how the decision is invalid.

²⁸⁸ Gov't Code § 11523.

²⁸⁹ Business and Professions Code section 2019 requires the Board to have an office in Sacramento, authorizes it to have offices in Los Angeles, San Diego, and San Francisco, and states that "legal proceedings against the board shall be instituted in any one of these four cities."

²⁹⁰ Civ. Proc. Code § 1094.5(b).

²⁹¹ *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 812.

If the court determines that the findings and conclusions are supported by the weight of the evidence and that the Board acted within its discretion, the court will uphold MBC's decision and deny the petition. If not, the court can grant the petition in part (with respect to those findings it does not find supported) and deny the petition in part (affirming those portions of the decision which it concludes are supported by the weight of the evidence). The court can also grant the petition altogether, explaining how the findings are not supported by the evidence, the conclusions are not supported by the findings, or how — in its opinion — the penalty constitutes an abuse of discretion. Whenever a petition is granted in whole or in part, the matter is remanded to the Board for further proceedings (the issuance of a new decision) consistent with the court's ruling. The court may not tell the Board how to exercise its discretion (in other words, it cannot specify a penalty it prefers).

Either side may challenge the superior court's decision (or any part of the decision) by filing a petition for extraordinary writ in a court of appeal.²⁹² Unlike a direct appeal, this procedure requires the party filing the petition to promptly file papers supporting the claim, and file the entire administrative and superior court record with the court. The appellate court has three options. If it concludes the petition lacks merit on its face and does not believe additional briefing would be helpful, it may summarily deny the writ on the merits, thus obviating the need for oral argument and a written opinion. In most instances, however, the court issues an alternative writ. When an alternate writ is issued, the parties engage in full briefing, the court entertains oral argument, and it issues a written decision. The court also has the option of summarily granting the writ (reversing the lower court's decision without further input from the parties), but this has not yet been done by a court reviewing a superior court's decision concerning physician discipline. Although the procedure for judicial review of physician discipline has been expedited by this "extraordinary writ" process, the appellate court still uses the same standard of review it does for direct appeals: It determines whether the superior court's findings are supported by substantial evidence and are correct on matters of law.²⁹³

The appellate court's decision may be appealed to the California Supreme Court. Such review is entirely discretionary and is rarely attempted or granted.

Exhibit XII-A below presents the number of DMQ disciplinary decisions appealed to a court in the year indicated. It also reveals the number of decisions issued in those years in which either MBC prevailed or the respondent prevailed.²⁹⁴

²⁹² Bus. & Prof. Code § 2337.

²⁹³ The constitutionality of the "extraordinary writ" mechanism, which was added by SB 609 (Rosenthal) in 1995, was upheld by the California Supreme Court in *Leone v. Medical Board of California* (2000) 22 Cal. 4th 660.

²⁹⁴ Note that the number of decisions upholding DMQ orders or reversing/remanding them in a given year does not match the number appealed during that year. The number of court orders on DMQ decisions applies to a different universe of cases that were appealed in prior years. We present these figures only to give the reader an idea of how MBC fares when its disciplinary decisions are reviewed by the courts.

Ex. XII-A. Judicial Review of DMQ Decisions

	FY 2001-02	FY 2002-03	FY 2003-04
DMQ decisions appealed to:			
Superior Court	23	24	19
Court of Appeal	5	8	6
Supreme Court	2	3	2
DMQ decisions upheld by:			
Superior Court	16	16	5
Court of Appeal	5	4	5
Supreme Court	1	2	2
DMQ decisions reversed/remanded/vacated by:			
Superior Court	16	13	12
Court of Appeal	1	1	0
Supreme Court	0	0	1

Source: Medical Board of California

Exhibit XII-B below presents the average days from the filing of a petition for writ of mandate in a superior court until the superior court's decision; it also indicates the number of DMQ decisions that were stayed by the superior court — that is, their effective date was postponed — pending the conclusion of superior court review.

Ex. XII-B. Cycle Time and Stay Rate: Superior Court Review of DMQ Decisions

	FY 2001-02	FY 2002-03	FY 2003-04
Percentage of writ cases in which superior court stayed DMQ decision	34.7%	37.5%	47.3%
Average days from filing of petition → superior court ruling	357 days	375 days	409 days

Source: Medical Board of California

B. Initial Concerns of the MBC Enforcement Monitor

1. MBC's venue statute is encouraging "forum-shopping" and inefficient use of judicial resources, and is unnecessarily costing HQE and MBC substantial amounts of money every year.

As noted above, under Business and Professions Code section 2019 (which is unique to MBC), a respondent unhappy with a DMQ disciplinary decision may file a petition for writ of mandate in San Diego, Los Angeles, Sacramento, or San Francisco — regardless of where the administrative hearing was held and regardless of where the HQE DAG who prosecuted the case works. This has led to apparent "forum-shopping" on the part of defense counsel in search of a

Note also that the source of these figures is the Medical Board, whose Discipline Coordination Unit (DCU) closely tracks the status and disposition of every matter transmitted from MBC to HQE. DCU must undertake this tracking function because the computer systems of MBC and HQE are separate. Further, HQE just began utilizing its new ProLaw case management system in July 2004; prior to that time, HQE data tracking was not comprehensive. Because of the separate computer systems, DCU depends on the HQE DAG handling a writ matter to inform DCU that a writ has been filed and its subsequent disposition. These data represent the number and disposition of writs transmitted to DCU.

sympathetic judge. The Monitor's research reveals that, of 24 writs filed in 2002–03, only eight were filed in the same city where the administrative hearing was held and the HQE DAG works; the remaining 16 (66%) of them were filed in different cities. Eleven of those 16 cases were filed in Sacramento. During 2003–04, of 19 writs filed, only five were filed in the same city where the administrative hearing was held and the HQE DAG works; the remaining 14 (74%) were filed in different cities. Once again, Sacramento appears to be the “venue *du jour*” — ten of those 14 writ cases were filed in Sacramento.

This practice is resulting in the inefficient use of judicial resources — overburdening one court disproportionately while other courts are relatively unused by MBC petitioners. Additionally, it is costing MBC and HQE thousands of additional dollars to fly HQE DAGs all over the state for writ hearings.

2. MBC is inappropriately subsidizing the cost of the preparation of administrative hearing transcripts for writ proceedings.

When a licensee files a CCP section 1094.5 petition for writ of mandate challenging a DMQ disciplinary decision, that petitioner must request the record of the administrative proceeding from the Office of Adminstrating Hearings. Under section 1094.5, “[e]xcept when otherwise prescribed by statute, the cost of preparing the transcript shall be borne by petitioner.”²⁹⁵ OAH must prepare the record and deliver it to the petitioner “upon the payment of the fee specified in [Government Code] Section 69950 for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause.”²⁹⁶

Thus, through the interaction of CCP section 1094.5 and Government Code section 69950, the petitioner pays up front a specific amount per page, which tends to be only about one-half of the actual cost of the preparation of the transcript, and the agency is billed for the rest. Although the agency is permitted to recoup the amount it has been charged if it prevails in the writ proceeding, the recoupment process is long and complex, and requires OAH's cooperation in preparing billing paperwork. Further, according to MBC, “many cases for which the transcript is prepared pursuant to this section never result in the pursuit of a petition for writ of mandate once the petitioner reviews the record. Thus, for the majority of these cases, the Board is precluded from recovering its costs.”²⁹⁷

²⁹⁵ Civ. Proc. Code § 1094.5(a).

²⁹⁶ Gov't Code § 11523.

²⁹⁷ Medical Board of California, *Request for Approval of Proposed Legislation: Redirection of Office of Administrative Hearings Transcript Costs From the Agency to the Requestor* (circulated for the November 7, 1997 meeting of the Board's Committee on Attorney General Services).

MBC's underwriting or cross-subsidization of the cost of the preparation of the record in writ of mandate proceedings — to the tune of thousands of dollars per transcript and many more thousands of dollars each year — is unnecessary and particularly inappropriate in light of its current financial plight. Legally, the cost of transcript preparation in writ cases must be borne by the petitioner; if petitioner prevails, MBC is required to reimburse those costs. It is unfair for MBC to be required to cross-subsidize the petitioner's costs and then be unable to recoup them.

C. Initial Recommendations of the MBC Enforcement Monitor

Recommendation #46: Business and Professions Code section 2019 should be amended to require legal proceedings challenging the Board's decision following an administrative hearing to be instituted in Sacramento, San Francisco, Los Angeles, or San Diego — whichever is closest to where the administrative hearing was held. Consistent with the Monitor's Recommendation #39 regarding venue for administrative hearings, the venue for writ proceedings should lie in the city closest to where the administrative hearing was held.

Recommendation #47: Government Code section 11523 should be amended to eliminate the reference to Government Code section 69950 and instead require the petitioner to pay the actual cost of the transcript up front. If the petitioner prevails, he or she will be reimbursed by the Board. And those litigants who cannot afford to pay for the transcript up front are able to receive a free copy under a separate provision of law.²⁹⁸

²⁹⁸ Gov't Code § 68511.3; see also *Board of Medical Quality Assurance v. Superior Court (Dean, Real Party in Interest)* (1988) 203 Cal. App. 3d 691.

